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SUPREME COURT, U.S.

NO. 80-846

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JIM ROSE, WARDEN

Appellant - Petitioner

-vs-

NOAH HARRISON LUNDY

Appellee - Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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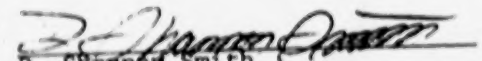
MOTION

Now comes Noah Harrison Lundy, Respondent, by and through counsel appointed for him by the United States Court of Appeals for the Sixth Circuit, and moves the Court for leave to proceed in forma pauperis. Respondent has proceeded in forma pauperis in the United States Court of Appeals for the Sixth Circuit and in the United States District Court, Middle District of Tennessee, Nashville Division. Counsel was appointed pursuant to 18 U.S.C. 3006 A.

GUSTIN & LAWRENCE CO., L.P.A.

BY: 

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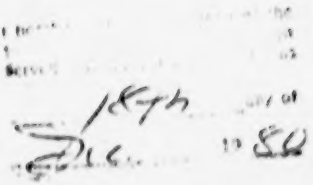

NO. 80-846

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JIM ROSE, WARDEN

Appellant-Petitioner,

vs.

NOAH HARRISON LUNDY

Appellee-Respondent.

RECEIVED
DEC 20 1980
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SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a petition for relief under 28 U.S.C. 2254 should be dismissed, without prejudice, where the petition presents several claims for relief some of which have satisfied the exhaustion requirements of 28 U.S.C. 2254 (b), but where one or more of the claims have not been presented to the state courts, thereby failing to satisfy the exhaustion requirements.

2. Whether habeas corpus was properly granted on the grounds of prosecutorial misconduct.

3. Whether habeas corpus relief was granted on the basis of an improper jury instruction.

4. Whether this case should be remanded to the district court which granted habeas corpus relief without considering the entire State trial transcript and where the petitioner requested such relief before the Court of Appeals.

5. Whether the respondent's right of confrontation was abridged when the State Trial Court limited his cross-examination of the State's main witness concerning her prior statements to defense counsel.

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
Table of Authorities	ii
Opinions Below	1
Grounds on which Jurisdiction is Invoked	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	1
Reasons for Granting the Petition	7
Conclusion	12
Appendix	A-1

TABLE OF AUTHORITIES

Cases Cited

Alford v. U.S., 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624	11
Barber v. Page, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255	11
Berger v. California, 393 U.S. 314, 89 S. Ct. 540, 21 L. Ed. 2d 508	11
Brader v. 30th Judicial Circuit, 410 U.S. 484, 93 S. Ct. 1123, 35 L. Ed. 2d 443	8
Brookhart v. Janis, 384 U.S. 1, 86 S. Ct. 1245, 16 L. Ed 2d 314	11
Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297	11
Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 374	11
Gordon v. U.S., 344 U.S. 414, 73 S. Ct. 369, 97 L. Ed. 447	11
Johnson v. U.S.D.C., 519 Fed. 2d 738 (8th Cir.)	7
Manensi v. Stubbs, 408 U.S. 204, 92 S. Ct. 2308, 33 L. Ed. 2d 293	11
Parker v. Gladdon, 385 U.S. 363, 87 S. Ct. 468, 17 L. Ed. 2d 420	11
Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1063, 13 L. Ed. 2d 923	11
Smith v. Illinois, 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956	11
Tyler v. Swenson, 483 Fed. 2d 611 (8th Cir.)	7

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Page

U.S. ex rel Boyance v. Myers, 372 Fed. 2d 111 (3rd Cir.)..... 8

U.S. v. McMann, 394 Fed. 2d 402 (2nd Cir.)..... 8

OPINIONS BELOW

The unreported and reported opinions below are presented in the Petition for Writ of Certiorari of Petitioner.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The grounds on which jurisdiction is invoked are presented in the Petition for Writ of Certiorari of Petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the Petition for Writ of Certiorari of Petitioner.

STATEMENT OF THE CASE

Noah Lundy was convicted by a jury, contrary to his pleas, of rape and crime against nature and was sentenced to terms of one hundred and twenty (120) years and fifteen (15) years, respectively, in the Tennessee State Penitentiary. Lundy's convictions were affirmed by the Tennessee Court of Criminal Appeals on August 30, 1974, and the Tennessee Supreme Court denied review on March 10, 1975. Noah Lundy then petitioned the Knox County Criminal Court, Tennessee, for a writ of habeas corpus which was denied, after an evidentiary hearing, on May 3, 1976.

Lundy then petitioned the United States District Court for the Middle District of Tennessee, Nashville Division, for a writ of habeas corpus under the provisions of 28 U.S.C. 2254 and alleged four grounds for relief:

(1) that he was denied his right of confrontation during cross-examination of the prosecutrix;

(2) that he was denied his right to a fair trial because of a prejudicial remark made by the prosecuting attorney to the jury to the effect that Lundy had a violent character;

(3) that he was deprived of his right to a fair trial when the prosecuting attorney commented, during closing arguments, that the only proof before the jury was from the

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state's witnesses and was uncontradicted and rebutted; and,

(4) that the trial judge improperly instructed the jury that every witness is presumed to swear the truth.

The district court granted habeas corpus relief to Noah Lundy on March 21, 1979, which decision was affirmed by the United States Court of Appeals for the Sixth Circuit.

During the course of the Trial, Lundy's counsel attempted to cross-examine the alleged victim of the crime concerning a conversation he had with her in his office prior to trial. The Assistant Attorney General objected to use of that conversation, stating in front of the jury that defense counsel had not informed the alleged victim who he was, that his actions were improper, that the alleged victim should have been advised she had a right to counsel:

Q So you had had intercourse with boys during 1973, is that true or not true?

A Just Aaron Miller.

Q And you had intercourse with Danny Nipper, a boy by the name of Danny Nipper, had you not?

A Not in the year '73. That was the year before in '72.

Q I believe you had intercourse with Aaron Miller ten to twenty times during this period, had you not?

A I don't remember how many times.

Q That's what you told me previously.

A I don't remember.

GEN. EVANS: Object to what he told her previously.

THE COURT: Very well. I sustain the objection. You may ask her questions, Mr. Workman; but, ladies and gentlemen of the jury, you will not consider for any purpose the comment of counsel. The duty of counsel is to ask the questions and let the witness answer them. All right.

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Q Miss Murphy, did you or did you not tell me on an occasion when I talked with you that you had had intercourse with Aaron Miller ten to twenty times?

A I don't remember.

GEN. EVANS: Your Honor, I want to object to that, because I consider the conversation he had with her--this young lady--completely improper. He didn't inform her who he was--

MR. WORKMAN: What?

GEN. EVANS: ... he didn't inform her who he was, he didn't tell her she had a right to have counsel present, he didn't do anything. He got her down there ....

MR. WORKMAN: (Inaudible)

GEN. EVANS: She's telling the truth on the stand--and he got her down there, and now he's trying to make use of that conversation, which was completely improper, and I object to any reference to that conversation or any attempt to use it to impeach on cross-examination.

MR. WORKMAN: If I may, Your Honor, I don't like the inference that counsel got her down there and tried to twist her arm. As the Court knows, counsel in all cases try to contact the witnesses and find out what they know, and that's what I did in this case. It happens in 99 percent of the cases in this Court.

GEN. EVANS: In most cases, Your Honor, that I'm familiar with, I believe the proper thing to do is that counsel inform the people they're talking to, the people who they represent, which does not happen in this incident. This young lady did not know who

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she was talking to at the time she was talking to him.

MR. WORKMAN: During the course of my talking to her, I got a phone call from another....

THE COURT: Excuse me, excuse me, gentlemen. Would counsel approach the bench here a moment.

The Assistant Attorney General further accused the defense attorney of unethical conduct and threatened to make his conduct an issue in the case. This entire conversation took place in the presence of, and in fact included, the alleged victim. The Court sustained the objection, and did not permit cross-examination on what the witness had told the defense attorney during the conversation, as he did not identify himself as representing Lundy prior to asking her questions. When asked for authority for the ruling, the Court indicated none other than itself.

Also, during the exchange before the Jury, the Assistant Attorney General made a comment bolstering the witnesses' credibility. He later made a statement about Lundy's "violent nature":

Q Tell the jury whether or not you ever witnessed any difficulties between your sister, while she was dating the defendant, and the defendant?

MR. WORKMAN: Your Honor, I still don't see the materiality of this as to....

GEN. GILL: I would think the defendant's violent nature would be material to this case in the light of what the victim has testified to.

MR. WORKMAN: Your Honor....

GEN. GILL: I assume they claim that he's not this kind of a person, and we're trying to show that he is. That's the materiality.

During closing argument, the Assistant Attorney General

testified to the Jury concerning the contents of a conversation he had with the alleged victim prior to the trial:

> "And the first question I asked that young lady when I talked to her was why she got in the car, and she thought they were in the neighborhood, and it was raining, and she wanted to get a ride home. She's about as lazy as I am I guess."

Also, during closing arguments the prosecuting attorney, in rebutting the defense counsel's summation, made the following remarks:

> Now, evidently, the defendant's theory of this case is that we are to believe the minor inconsistencies in the State's proof, and, of course, the State's proof is what we are considering. The only story we've heard about what happened from 8:15 of the night of March 16th until about 4:00 in the morning of March 17th came from the State's witnesses. And we're suppose (sic) to think it's important whether or not he was asleep when we got there, whether he was covered or not covered, when the clothes were taken off, whether she was or was not held on the bed, whether or not she was forced with his hands or just suggested that she drink whiskey, and whether or not at one time at one point she had her hands somewhere on his back.

The trial judge instructed the jury as follows which instruction is the subject of Lundy's fourth claim for habeas corpus relief:

> The jurors are the exclusive judges of the facts and the credibility of the witnesses. You are judges of the law under the direction of the court. If there are conflicts in the evidence, you must reconcile them, if you can, without hastily or rashly concluding that any witness has sworn falsely, for every witness is presumed to swear the truth.

The district court found that grounds 1 and 2 of Lundy's petition had been fairly presented to the Tennessee Supreme Court but that Lundy had not exhausted his available state remedies with respect to grounds 3 and 4 of his petition. The district court granted habeas corpus relief to Lundy on March 21, 1979 and ordered the State of Tennessee to re-try Lundy within ninety (90) days or to release him from custody. The state appealed to the United States Court of Appeals for the Sixth

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Circuit which Court affirmed the judgment of the district court on June 27, 1980. The petitioner's petition for rehearing and suggestion en banc was denied on September 4, 1980.

REASONS FOR DENYING THE PETITION

I

Claims in a Petition for Writ of Habeas Corpus which meet the exhaustion requirement can be considered by the Court, even though other claims in the Petition do not meet the exhaustion requirement. Johnson v. U.S.D.C., 519 Fed. 2d 738 (8th Cir.), Tyler v. Swenson, 483 Fed. 2d 611 (8th Cir.).

Lundy's Petition for Writ of Habeas Corpus contained four grounds for relief:

1). Trial Court violated defendants' constitutional rights by limiting his cross-examination of the witnesses against him.

2). The prejudicial conduct of the Assistant Attorney General violated defendants' United States Constitutional rights.

3). Attorney Generals adverse comments relating to defendants failure to testify.

4). Trial Court Judge's improper charge to Trial jury violated defendants' constitutional rights.

The District Court found that grounds three and four had not been presented to the state court and stated that it would not consider them in the constitutional framework, but might refer to them collaterally.

Petitioner argues that because all of Lundy's claims did not meet the exhaustion requirement, even the claims properly pursued should have been dismissed. Courts have addressed this question and resolved the conflict between the exhaustion requirement and a remedy for violation of constitutional rights:

> We recognize . . . the desirability, where circumstances permit, of including all grounds for habeas in a single petition. But we think this does not outweigh the legitimate interest of a prisoner in obtaining prompt

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> federal consideration of an adequate and properly asserted ground for relief that has been urged unsuccessfully before the state courts. U.S. ex rel Boyance v. Myers, 372 Fed. 2d 111 (3rd Cir.)
>
> However, where the unexhausted claims are either unrelated to the principal exhausted claim or frivolous, the desirability of including all grounds for habeas corpus in a single petition does not outweigh the interests of a prisoner in obtaining prompt federal consideration of exhausted claims. U.S. v. McMann, 394 Fed. 2d 402 (2nd Cir.)

The issue has perhaps been best put into perspective by the Court in Brader v. 30th Judicial Circuit, 410 U.S. 484, 93 S. Ct. 1123, 35 L. Ed. 2d 443:

> The doctrine of exhaustion of state remedies as a pre-requisite to federal habeas corpus action is a judicially crafted instrument which reflects a useful balance between important interests of federalism and the need to preserve the Writ of Habeas Corpus as a swift and imperative remedy in all cases of illegal restraint or confinement. This doctrine cannot be used as a blunderbuss to shatter the attempt at litigation of constitutional claims without regard to the purposes which underlie the doctrine and which called it into existence.

To hold that the District Court could not consider the exhausted claims which addressed Lundy's deprival of a fair trial because two separate claims had not been exhausted would indeed be an indiscriminate firing of the blunderbuss.

II

The prejudicial conduct of the prosecution was challenged at the State Trial Court and State Appellate Court levels. Each example referred to in the opinion of the District Court granting the Writ of Habeas Corpus may not have been presented in Lundy's brief in the State Courts, but the issue was raised and exhausted.

The issue is not how many instances of misconduct existed and how many were objected to, but whether or not there was prosecutorial misconduct. This issue was raised and the

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CINCINNATI, OHIO

prosecutorial misconduct was established and recognized by the Court of Criminal Appeals of Tennessee. The District Court in considering this claim for relief had a duty to review the record closely to find if Lundy's claim was supported by the record. The Court was considering a petition filed pro se by one not trained in the law on preprinted form, which advises Petitioner to "tell your story briefly without citing cases or law". The Court discharged this duty by referring to "a substantial amount of testimony".

Upon review of the record, it becomes clear that the States Attorneys' comments to the Jury concerning Defense Counsel's conduct in interviewing the witness plus his repeated testimony throughout the examination of witnesses and closing argument and his expression of his personal views of the Defendant's nature.

III

The District Court did not grant relief on the ground of an erroneous jury instruction.

In the memorandum accompanying the order granting the Writ of Habeas Corpus, the District Court stated it would not consider the two unexhausted claims in the constitutional framework (i.e., as a basis for granting the Writ), but might refer to them collaterally in assessing the atmosphere of the cause taken as a whole. (Appendix C)

In reviewing the Court's Memorandum it is clear that the Court considered the Trial Court's charge, not for its legality, but for the effect it had on the jury's evaluation of the testimony of the alleged victim in the light of lack of opportunity to cross-examine her on her previous statements to defense counsel. In fact, the District Court did not even find the charge that every witness is presumed to swear the truth erroneous.

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Also, the effect of the Jury Instruction, correct or incorrect, must be weighed in reference to the voluminous testimony by the Assistant Attorney General, not subject to any cross-examination, referred to by the District Court.

IV

Petitioner raised Five Questions for review in the Court of Appeals. None of them were addressed to the question of an incomplete record in the District Court, nor did Petitioner in its brief ask for the Court of Appeals to remand the case to the District Court for review of the entire record. This question is presented for the first time in the Petition for Writ of Certiorari and ought not to be considered.

The Petitioner having filed only a partial transcript, having failed to request an evidentiary hearing, having failed to assign the question of the record as error, cannot now be heard to complain of an incomplete transcript.

V

Lundy was deprived of his Sixth Amendment Right of Confrontation by the refusal of the Court to permit his attorney to cross-examine the state's chief witness concerning a conversation with the attorney prior to trial. The Court's reason was that the attorney did not identify himself as the representative of the Defendant prior to the conversation. This was certainly no basis in law for denial of cross-examination on the items revealed in the conversation.

Both this issue and that of prosecutorial misconduct was presented to the Court of Criminal Appeals which found error on both counts but found it not to be prejudicial.

The denial of reasonable latitude in cross-examination is prejudicial error and it is not necessary to show that the cross-examination, if preserved, would necessarily have brought

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out facts tending to discredit the testimony in chief. Alford v. U.S., 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624.

Here the witness whose cross-examination was erroneously restricted by the Trial Court's ruling was the alleged victim of the offenses and the state's chief witness. Had her credibility been successfully challenged on the issue of voluntariness, the outcome of the case might have differed greatly. "Where a criminal case may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny. Gordon v. U.S., 344 U.S. 414, 73 S. Ct. 369, 97 L. Ed. 447.

The right to confront witnesses is a Trial right, and includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. Barber v. Page, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255; Manensi v. Stubbs, 408 U.S. 204, 92 S. Ct. 2308, 33 L. Ed 2d 293; Berger v. California, 393 U.S. 314, 89 S. Ct. 540, 21 L. Ed. 2d 508.

The jury in this case was denied the opportunity to hear the witness cross-examined on her prior statement and to observe her demeanor when confronted with those statements.

The right of confrontation and cross-examination is a fundamental requirement of a constitutionally fair Trial, and denial of that right is a constitutional error so great that no amount of showing of want of prejudice can cure. Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed 2d 923; Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 374; Parker v. Gladdon, 385 U.S. 363, 87 S. Ct. 468, 17 L.Ed. 2d 420; Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. ed. 2d 297; Brookhart v. Janis, 384 U.S. 1. 86 S. Ct. 1245, 16 L. Ed. 2d 314; Smith v. Illinois, 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956.

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CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[illegible] copy of the [illegible] brief on [illegible] this

18th day of

Dec. 1980

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APPENDIX CONTENTS

A. Memorandum Opinion of the United States Court of Appeals for the Sixth Circuit, June 27, 1980

B. Memorandum Opinion of the United States Court of Appeals for the Sixth Circuit, September 4, 1980

C. Memorandum Opinion and Order of the United States District Court, Middle District, Tennessee, March 21, 1979

D. Opinion of the Tennessee Court of Criminal Appeals, August 30, 1974

E. Opinion of the Tennessee Supreme Court, March 10, 1975

CASPER AND LAWRENCE

79-1280

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
JUN 27 1980
JOHN P. HEHMAN, Clerk

NOAH HARRISON LUNDY,

Petitioner-Appellee

V.

JAMES ROSE, Warden, and the
Attorney General of Tennessee,

Respondents-Appellants

O R D E R

Before: CELEBREZZE, ENGEL and MARTIN, Circuit Judges

The respondent appeals from a judgment of the district court granting a writ of habeas corpus discharging Noah Harrison Lundy from custody unless he is retried within ninety days on state charges of rape and crime against nature.

While Lundy's petition stated four grounds for relief, the district judge ruled only on the first two: (1) that Lundy's attorney was prejudicially limited in his cross-examination of the prosecutrix in violation of the petitioner's right of confrontation; and (2) that the prosecuting attorney had violated Lundy's right to due process under the Fourteenth Amendment by improper argument and comment in the presence of the jury. The district judge held that Lundy had not exhausted his state remedies on the remaining claims that the prosecutor had impermissibly commented upon the defendant's failure to testify and that the trial court improperly instructed the jury.

The state in its brief asks this circuit to adopt what it characterizes as a rule in two other circuits requiring district courts to dismiss all petitions for writs of habeas corpus where the petitions assert claims which the petitioner has not exhausted in the state court system. See Galertieri v. Wainwright,

582 F.2d 348 (5th Cir. 1978) and Gonzales v. Stone, 546 F.2d 807 (9th Cir. 1976).

Such a rule has not found favor in the Sixth Circuit and this court declines to adopt it in the present case.

With respect to the first and second grounds for relief, the court, upon consideration of the entire record, concludes that District Judge L. Clure Morton, in an opinion dated March 21, 1979, properly found, after examining the state court proceedings, that petitioner's constitutional rights had been seriously impaired by the improper limitation of his counsel's cross-examination of the prosecutrix and by the prosecutorial misconduct. The state's argument that any constitutional errors are insulated from review by habeas corpus by the cause and prejudice rule of Wainwright v. Sykes, 433 U.S. 72 (1977), is without merit, it appearing that in all events the state courts of Tennessee did not apply any Tennessee state contemporaneous objection rule with respect to such claims, but had proceeded to consider the same on the merits. Accordingly,

IT IS ORDERED that the judgment of the district court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

ISSUED AS MANDATE: SEPTEMBER 12, 1980
COSTS: NONE
A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By Audrey Corbett
Deputy Clerk

79-1280

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

JOHN P. HEHMAN, Clerk

NOAH H. LUNDY,

Petitioner-Appellee

V.

JIM ROSE, Warden, Tennessee
State Penitentiary,

Resondent-Appellant

O R D E R

Before: CELEBREZZE, ENGEL, and MARTIN, Circuit Judges

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the respondent-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court finding no issues presented which have not been previously considered,

IT IS ORDERED that the petition for rehearing en banc be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

John A. Hehman
Clerk

RECEIVED FOR ENTRY
3:00P M
3/21/79

Julia B. Cross
Clerk

BY Nancy F. Lowe
Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NOAH HARRISON LUNDY

VS.

NO. 79-3081-NA-CV

VINSON THOMPSON, Warden, Tennessee State Penitentiary and the ATTORNEY GENERAL FOR THE STATE OF TENNESSEE

ORDER

In accordance with the Memorandum contemporaneously filed, a Writ of Habeas Corpus shall be granted and the defendant discharged from custody unless within ninety (90) days the State of Tennessee initiates steps to try defendant anew.

L. CLURE MORTON

506

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

REC'D FOR ENTRY 3:00P M 3/21/79

John A. Cross Clerk

BY Mary J. Cross Deputy Clerk

NOAH HARRISON LUNDY

VS.

VINSON THOMPSON, Warden, Tennessee State Penitentiary and the ATTORNEY GENERAL FOR THE STATE OF TENNESSEE

NO. 79-3081-NA-CV

MEMORANDUM

Petitioner Noah Harrison Lundy seeks relief pursuant to 28 U.S.C. § 2254 from a judgment of conviction of rape and crime against nature. He has asserted four grounds for relief:

1. Limiting the cross examination of a witness (prosecutrix).

2. The prejudicial conduct of prosecuting attorney in making certain remarks in front of the jury.

3. That the prosecuting attorney commented on the failure of the defendant to testify.

4. The trial court gave an improper charge to the jury that every witness is presumed to swear the truth.

The petitioner asserts that grounds three and four have not been previously presented to any court, state or federal. The records of the state cause reflect that grounds one and two were presented to the highest court in Tennessee having jurisdiction and decided adversely to petitioner. The records further reveal that grounds three and four were not so presented.

Since grounds three and four have not been presented to the state court there has been no exhaustion of remedies as

489

to these two. Thus this court will not consider them in the constitutional framework. However, in assessing the atmosphere of the cause taken as a whole these items may be referred to collaterally.

Prosecutorial misconduct and the deprivation of a meaningful cross examination of one of two eye-witnesses (the prosecutrix) was squarely presented in the court proceedings. The Court of Criminal Appeals of Tennessee responded in the following language:

> Error is assigned upon the trial court's ruling that defense counsel could not cross-examine the victim by asking her about specific statements that she supposedly made to defense counsel in a pre-trial interview in defense counsel's office. The predicate for this ruling was the fact that defense counsel did not tell the witness that he was counsel for the defendant, but only that he was a lawyer in the case. The final assignment of error is related to this one, in that it accuses State's counsel of making prejudicial remarks about defense counsel during argument before the jury about the admissibility of these questions.
>
> We note that the trial judge permitted cross-examination upon the same subject matter, but simply ruled out predicating the cross-examination questions upon the prior questions and answers. From the tender of proof in the record we do not believe that defendant was prejudiced by what we deem to have been too restrictive a ruling. Defense counsel was under no positive duty to affirmatively identify his role in the upcoming case before questioning a witness. He apparently made no misrepresentation, and was apparently seeking the truth. State's counsel was unduly critical of defense counsel in indicating before the jury that State's counsel should have been present at the interview, etc., but we hold this error to be harmless in the context of this case.

To properly address the two grounds asserted by petitioner, it is necessary to refer to a substantial amount of testimony. Thus pages 42 through 55 and pages 88 and 113 of the evidence, the argument of the Attorney General to the jury, pages 262 through 268, and the charge of the court on page 291 are made an appendix to this memorandum.

An analysis of the testimony reflects improper conduct of the Attorney General as follows:

(1) On pages 43 and 44 the state's attorney represented to the jury that defense counsel was guilty of illegal and unethical conduct on interviewing the prosecutrix when he knew or should have known that his representation was false.

(2) On page 44 the state's attorney testified to the jury that the prosecutrix was telling the truth. Clearly, this was reprehensible conduct in that the attorney placed his own reputation and the power of the state as vouching for the truthfulness of the testimony of this witness. Neither the attorney nor the State of Tennessee were subject to cross examination. The statement in evidence by General Evans was, "She's telling the truth on the stand . . . ."

(3) The Attorney General stated in the presence of the jury his idea of the proper method for a defense counsel to interview witnesses.

(4) The Attorney General clearly misrepresented the law to the court in connection with the interviewing of the government's witnesses.

(5) The Attorney General represented to the court that the prosecutrix and victim of an alleged criminal event has the right to be represented by counsel and for an attorney general of the State of Tennessee to be present when the witness is interviewed by defense counsel. This is, of course, ridiculous.

(6) The Attorney General represented to the court that because defense counsel interviewed the prosecutrix without an attorney or the state's attorney present, the conduct of defense counsel was inexcusable. This is less than the conduct required of an attorney general charged with the equal treatment of all citizens.

(7) The Attorney General denied an intention to file a grievance with the "Bar Association" because of the aforementioned

alleged unethical conduct. The implication that such a grievance would be valid constitutes an effort to browbeat defendant's counsel.

(8) Through the objections of the Attorney General, which had no legal basis, the court was induced to deprive defendant of the right to effectively cross examine the victim, possibly the most important witness against defendant. The objection and ruling were that the witness could not be examined as to previously conflicting statements prefaced by, "Did not you tell me on [a prior] occasion . . . ." As stated by the appellate court in this cause, the ruling was erroneous. An attorney for the State of Tennessee represents that he has sufficient knowledge to properly prosecute cases without infringing the Sixth Amendment rights of defendants. If this prosecutor had such knowledge, it was not evidenced in this cause.

(9) The Attorney General stated in the presence of the jury, "I would think the defendant's violent nature would be material in this case . . . ." Once again the prosecuting attorney placed his personal testimony before the jury. By this statement he indicated to the jury that the State of Tennessee vouched for such a fact.

(10) In the final summation by the Attorney General he used the word "I" innumerable times. He continuously testified and added his personal evaluations to the State's proof. Some examples are:

(a) I cannot imagine in my own mind a worse crime being committed, a more personally humiliating crime being committed.

(b) I can't think of a more grave or upsetting crime than the ones we'ves[sic] heard here for the last two days.

(c) The only story we've heard about what happened from 8:15 on the night of March 16th until about 4:00 in the morning of March 17th <u>came from the State's witnesses</u>. (Emphasis supplied)

(d) I don't think it's important, but . . . .

(e) Now, I, like General Gill, could not believe the words I was hearing back when we started this case . . . . (emphasis supplied)

(f) Well, I think it's pretty important to her.

(g) I don't think she'll ever forget what she went through that night out there.

(h) . . . and the first question I asked that lady when I talked to her was why she got in the car, and she thought they were in the neighborhood, and it was raining, and she wanted to get a ride home. She's about as lazy as I am, I guess.

The very minimum interpretation of this statement to the jury is that the Attorney General was testifying to a conversation which occurred in his first interview with the prosecutrix in his office. In addition he was giving testimony as to the reason for the action of the prosecutrix in entering the defendant's car, i.e., laziness.

503

(i) On the other hand, if you think as I do, and I've never wanted to be on a jury more in a case I've tried, that this is one of the most despicable crime I have ever heard testimony presented in six years of being in prosecution . . . . (emphasis supplied)

. . . and I don't mean ten years, and I don't mean twenty years, and I don't even mean ninety-nine years. I mean forever. If you agree with me that it is despicable as I feel it is, I want you to set a term that . . . .

In addition to the lack of opportunity to cross-examine, the foregoing testimony of the Attorney General was prejudicial in that he made a factual comparison of testimony in similar cases based on his personal experience as a representative of the great State of Tennessee.

(j) I don't think there's anything unreasonable about a term of years that will make sure he spends the rest of his life in the penitentiary, and that's a term way over the standard fifty or sixty or seventy years for rape.

In addition to advising the jury of his personal opinion (not subject to cross-examination and a direct violation of ethical standards), the Attorney General represented that there was a standard term of incarceration on conviction for rape of from fifty to seventy years. Any first-year law student would recognize this statement as being a deliberate falsehood. Even though the court instructed the jury there was no standard, the prosecuting attorney had placed before the jury the thought that some kind of measuring stick did in fact exist.

The above related items were followed by the charge of the court which contained the following:

> The jurors are the exclusive judges of the facts and the credibility of the witnesses. You are judges of the law under the direction of the court. If there are conflicts in the evidence, you must reconcile them, if you can, without hastily or rashly concluding that any witness has sworn falsely, for every witness is presumed to swear the truth." (emphasis supplied)

Without determining the legality of the above charge (See generally, Cupp v. Naughten, 414 U.S. 141 (1973)), since this question has not been presented to the courts of the State of Tennessee, and assuming as we must that the jurors followed the law as given by the court, the jurors were instructed that they must presume that the testimony given by the victim was true. The jury had no opportunity to determine whether the witness had made a conflicting statement to the defense attorney prior to trial. This when coupled with the personal testimony of the Attorney General, both during the presentation of the State's case and during argument, constitutes a clear violation of defendant's right to a fair trial. Also, subject to the question of exhaustion of state remedies, where there is added to the trial atmosphere the comment of the Attorney General that the only story presented to the jury was by the state's witnesses there is such mixture of violations that one cannot be separated from and considered independently of the others.

Aside from addressing the illegal restriction on defense counsel of the cross examination of a key state witness, the state court addressed the remaining issues in the following language: "We have carefully examined all assignments of error. We affirm the convictions."

This court is aware that there is sufficient evidence, if believed by the jury, to sustain the conviction of the petitioner for this terrible crime. However, that evidence is overwhelming only if the testimony of the prosecutrix (victim) is likewise believed. Under the charge as given, the limitation of cross examination of the victim, and the flagrant prosecutorial misconduct this court is compelled to find that petitioner did not receive a fair trial, his Sixth Amendment rights were violated and the jury poisoned by the prosecutorial misconduct.

See Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L.Ed. 2d 347 (1974). Cf. Donnelly v. De Christoforo, 416 U.S. 637, 644, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). (Prosecutorial impropriety did not amount to denial of fair trial where trial judge "took special pains" to correct any misimpression of jury.) See generally, United States ex rel. Fournier v. Pinto, 408 F.2d 539 (3rd Cir. 1969).

The Writ shall be granted and the defendant discharged from custody unless within ninety (90) days the State of Tennessee initiates steps to grant defendant a new trial.

L. CLURE MORTON
CHIEF JUDGE

This opinion will be released and filed on August 30, 1974, at 10 o'clock A.M.
JOHN A. PARKER, Clerk

FILED
AUG 30 1974
JOHN A. PARKER, Clerk
By

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

KNOXVILLE, APRIL, 1974

NOAH LUNDY,
Plaintiff-in-Error

v.

STATE OF TENNESSEE,
Defendant-in-Error

No. 283

Knox County

Hon. Richard R. Ford, Judge

(Rape and Crime Against Nature)

106

For the Plaintiff-in-Error:

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Geoffrey D. Kressin
Knoxville, Tennessee

For the Defendant-in-Error:

David M. Pack
Attorney General

Bart Durham
Assistant Attorney General

Lance D. Evans and
John W. Gill, Jr.
Assistant District Attorneys General

Opinion Filed: AUG 30 1974

AFFIRMED

WILLIAM S. RUSSELL,
Judge

OPINION

The plaintiff-in-error, Noah Lundy, indigent and represented by appointed counsel, appeals his convictions for rape and a crime against nature and consecutive penitentiary sentences of one hundred twenty (120) and five (5) to fifteen (15) years.

The alleged rape victim, Sharon Murphy, was enticed into Lundy's automobile by Lundy's fourteen-year-old female companion, Terri Tankersly, at his direction, on the pretext of giving the victim a ride home. Miss Murphy had walked alone to a neighborhood market to purchase solft drinks shortly after 8 p.m. It had begun to rain. She entered the car in response to an offer of a ride in the belief that the couple lived in the neighborhood. Lundy did drive her past the apartment where she was living, but refused to stop the car. The victim testified that after passing her home Lundy restrained her by grabbing her arm, subsequently ordered her to change places with the other girl by moving to the center seat position, and as they continued to drive ordered her to remove all of her clothing. The victim asked Terri Tankersly if she had to, and was given an affirmative answer. Lundy told the victim that he would knock her brains out if she didn't undress. Scared and crying, Miss Murphy completely disrobed. Lundy put his hand between her legs, she slapped it and he removed it. At Lundy's direction Terri Tankersly blindfolded the victim with Miss Murphy's bra.

When the three arrived at Lundy's apartment the victim was allowed to put back on her shorts and a jacket and was led inside. Terri Tankersly brought the balance of her clothing. Once inside the apartment Lundy ordered her to completely disrobe again, and to get upon the bed. Her blindfold was removed at her request. He also undressed. The victim asked for a drink of water, which

the other girl got for her. Lundy made her drink some whiskey from a bottle from which he was imbibing. He then ordered Miss Murphy to lie on the bed. She testified that he took her hands and held them up over her head as he commenced intercourse.

Miss Murphy at no time fought, screamed, ran or in any way resisted the intercourse. No weapon was ever used or displayed by Lundy. Miss Murphy was concerned that they would hurt, or kill her; and begged them not to. It seems fair to say that the victim was more apprehensive about possibly being hurt or killed than she was about being sexually violated, as she was passively submissive. It cannot be denied, however, that she was totally within the power of her captors, and her obedience to submission orders must be weighed in that context.

After the first act of intercourse, which apparently did not result in a sexual climax for Lundy, he ordered Terri Tankersly to put a cloth on the kitchen table. He then ordered the victim to go to the kitchen and lie upon her back upon the table, with her head hanging over the edge. He threatened to knock her brains out if she didn't comply. When thus positioned, he ordered Miss Murphy to open her mouth, and "he stuck his penis down my throat". She gagged and pushed him away, at which time he viciously struck her with his fist upon the cheek, the mouth and the forehead. The victim commenced crying again. He made her lie back down again, and inserted his penis down her throat and moved it in and out, and she started to vomit and pushed him away again. He struck her with his fist upon the abdomen and upon the right side. She got off the table, crying, and asked for a drink of water. His response was to make her get down on her knees and he urinated in her mouth, making her swallow most of the urine.

Lundy then ordered the victim back into the bed, already occupied by the disrobed Terri Tankersly. He first ordered Miss

Murphy to insert her finger into the other girl's vagina and manipulate it, despite Terri Tankersly's begging him not to. After this was done he ordered Miss Murphy to suck the other girl's vagina. When compliance did not suit Lundy, he struck Miss Murphy twice upon the back of her head with his fist. She then performed the cunnilingus for about two minutes before becoming sick. He then allowed her to stop. Terri Tankersly testified that while Miss Murphy was performing cunnilingus upon her that Lundy was "trying to have relationship with her in her rear end".

Finally, Lundy had normal intercourse with the victim again, for more than thirty minutes, without ever reaching a climax. He discussed tying Miss Murphy to the bed and keeping her for two or three days, and even had the other girl to tie some socks together to use for bindings. However, at the victim's suggestion, he went to sleep. Significantly, Terri Tankersly, the fourteen year old companion of Lundy and with whom he had admittedly been having sexual intercourse for years, fled the apartment as soon as Lundy was asleep. She tried to get Miss Murphy to go with her, expressing the fear that he was going to kill both of them; but the victim was afraid to leave at that time for fear of awakening Lundy, who had an arm and leg across her. Some two hours later, when he turned over, she fled the premises, hailed a passing taxi, and immediately reported having been kidnapped and raped. 109

All of this obscene detail has been necessary to this opinion because of the serious question raised as to whether the intercourse was forcible rape. No weapon was ever exhibited, and no resistance was offered. Both sides rely upon the case of King v. State, 210 Tenn.150, 357 S.W.2d 42(1962). Unquestionably the act to constitute rape must be forcibly done and against the will of the female. Force means power, compulsion or strength directed toward an end. And against her will means against or without her consent express or implied. King v. State, supra. Whether force

-3-

was used is a jury question. In this case, apparently no significant force was directly employed in conjunction with the acts of normal intercourse. The victim was told to submit and she did. But, in context, it cannot be said that she consented, nor can Lundy seriously contend that she did. At all times she was a captive, in justified fear for her very life. Admittedly having had some prior sexual experience, she chose to submit to avoid injury or even death. Consent obtained by force or fear due to threats of force is void and the offense rape. 1 Wharton's Criminal Law and Procedure 649, §311. Her tacit consent by non-resistance has been found by the jury to be no consent under the circumstances. She did not consent to being kidnapped and imprisoned; and it was in that context that she was raped. It would be an unreasonable misapplication of the law to require as a matter of law that a captured female be required to incur a beating before it could be said that demanded intercourse with her was rape. The force and restraints inherent in the situation supply the forcible character to the act. We hold in response to the first two assignments of error, that the convicting evidence on the charge of rape is legally sufficient to support the conviction and that it was not error for the trial judge to refuse to direct a not guilty verdict. A jury question was certainly presented by the proof.

The cunnilingus which Lundy forced the two girls to engage in is the basis for his crime against nature conviction. It is assigned as error that both convictions cannot stand because "there was only one common intent". It is clear under these facts that different evidence is required to establish the two different acts, and that a different and separate intent was reflected. The assignment is overruled. See Ward v. State, Tenn.Crim.App., 486 S.W.2d 292; Harris v. State, 206 Tenn.276, 332 S.W.2d 675; and Rockett v. State, Tenn.Crim.App.475 S.W.2d 561. Error is assigned upon the trial court's refusal to charge a certain "special request".

It was defense counsel's theory that the State could not impeach any of the testimony of Terri Tankersly, whom they had called as a prosecution witness, and a note was passed to the trial judge, in response to his invitation for special requests, asking him to charge the law relative to the State's attesting to the credibility of the witnesses it calls. No specific language was tendered; so, in legal affect, no special request was made. The note said: "Defendant Noah Lundy requests the Court to give its standard and normal charge that one party to the case calling a witness in its behalf makes that person that side's witness and the legal effect thereof as to the other testimony being binding and the side calling the witness attesting for credibility". The charge as given was correct. If more specificity and enlargement on a given point was desired it was necessary to tender the exact charge requested. The trial judge noted: "Refused. Ambiguous and unclear. The Court's charge was adequate as given". We need not reach the question of sunstantive law sought to be raised, because the "special request" was not in a proper form to raise it. However, no authority is cited for the theory, if it be plaintiff-in-error's theory, that a criminal court judge must charge the jury that the State vouches for the credibility of each and every one of its witnesses, and is bound by their testimony. The assignment is overruled.

A related assignment complains that the State was permitted to ask questions of Terri Tankersly, their witness, which were of an impeaching nature. We do not find that this happened. On redirect examination she was asked questions which amplified her answers upon cross-examination, as was proper.

Error is assigned upon the admission into evidence of Lundy's written statement to officers, voluntarily given after full warnings. The sense of the assignment seems to be that the statement was not a full confession, so was inadmissible as a confession

It was admissible for whatever probative value that it had upon the issue of guilt, and the assignment is overruled.

The next assignment has to do with the victim's report to officers immediately after her escape. She gave them a detailed account of the events, substantially as she testified to them. One of the officers was permitted to testify as to exactly what she reported by referring to the written statement which he took from her. It is well settled that the report of a rape victim, given within a reasonable time after the fact, is competent evidence. King v. State, supra. That the report was reduced to writing adds to the accuracy of the offier's testimony, and certainly does not render the otherwise competent evidence incompetent.

The next assignment of error relates to the statement of Terri Tankersly, also given to officers shortly after the crime. Complaint is made that this statement was incompetent evidence. We find that this evidence was first gone into on cross-examination and thus made competent. The trial judge committed no error.

Error is assigned because of an attempt by the State to prove that Lundy had physically abused Terri Tankersly's sister years before in a totally unrelated occurence. The trial court properly excluded the evidence and instructed the jury to disregard the question. State's counsel made some remarks in the presence of the jury that were overly zealous in support of this incompetent line of proof, and in a different case could constitute prejudicial error. State's counsel alluded to "the defendant's violent nature" as being a matter of fact; and said that the State was trying to show that he was "that kind of a person". However, in the context of the undisputed facts of this case we hold any error to have been harmless beyond a reasonable doubt. Chapman v. California, 386 U.S.18, 87 S.Ct.824, 17 L.Ed.2d 705(1967); Huffman v. State, _____Tenn.Crim.App._____, 458 S.W.2d 29(1970).

-6-

victing the defendant of a crime against nature on the theory of aiding and abetting. Another related assignment is that the conviction on the charged act of cunnilingus is void and invalid because cunnilingus "is not prohibited as a crime against nature in T.C.A.§39-707".

This Court has recently held, in the context of a case of forcible cunnilingus committed by the defendant upon a victim, that the act was a crime against nature as proscribed by T.C.A.§39-707. Locke v. State, Tenn.Crim.App., 501 S.W.2d 826(1973). Again, in the case sub judice, you have the element of coercion, this time motivating both of the literal participants. Here, the direct participants were both female. Plaintiff-in-error contends that neither of the females was committing a crime under the circumstances, and reasons that there was no principal criminal whom Lundy could have been guilty of aiding and abetting.

Lundy was not indicted as an aider and abettor. He was charged: "* * * unlawfully and feloniously did commit a crime against nature in and upon one Sharon K. Murphy; that is to say, that the said Noah Lundy, Alias, did make, force and compel the said Sharon K. Murphy to perform an act of cunnilingus upon the said Terri Tankersly, a female, * * *".

The evidence certainly supports the factual allegations of the indictment. Lundy was not accused of aiding and abetting, but of forcing the commission of the proscribed act. Whether Sharon K. Murphy is called the victim, or Terri Tankersly, or nobody, is really immaterial. Crimes against nature may be victimless, with both parties as accomplices of one another; or they may involve an innocent person forced to participate, or incapable of consenting. In the case sub judice, both of the females were victimized.

The trial judge did charge the law of principal guilt by

being present, aiding and abetting, as set out in T.C.A.§39-109, as follows:

> "39-109. Aiders and abettors deemed principal offenders. —— All persons present, aiding and abetting, or ready and consenting to aid and abet, in any criminal offense, shall be deemed principal offenders, and punished as such."

We also have a statute which provides for the conviction of an aider and abettor whether the prinicpal offender has been convicted or not. T.C.A.§39-110. That statute does, however, presuppose that a principal exists; while in the instant case Lundy is himself the only principal. By forcing others to do an act which society has proscribed Lundy is himself directly responsible. The force and coercion was his active contribution to the cunnilingus. While the judge's charge dealt with aiding and abetting, and with conspiracy, and did not directly charge the jury that Lundy would be himself criminally chargeable with acts which he forced others to perform, the charge did say" "If, therefore, you find from the proof beyond a reasonable doubt that this offense has been committed by the defendant in manner and form as charged in the indictment * * * the defendant is guilty of the crime against nature and you should convict him of this offense* * *". In the absence of a special request for further instructions, we do not find reversible error in the charge. While the questions presented by the factual situation in this case are fuel for an academic trip of almost limitless dimensions, and would delight any law professor, we confine ourselves to holding that forced cunnilingus is a crime against nature, and that Lundy was more than an aider and abettor and was convicted under the indictment as the principal offender who forced the criminal act. No other principal is necessary to his conviction.

114

Error is assigned upon the trial court's ruling that defense counsel could not cross-examine the victim by asking her about specific statements that she supposedly made to defense counsel in

a pre-trial interview in defense counsel's office. The predicate for this ruling was the fact that defense counsel did not tell the witness that he was counsel for the defendant, but only that he was a lawyer in the case. The final assignment of error is related to this one, in that it accuses State's counsel of making prejudicial remarks about defense counsel during argument before the jury about the admissibility of these questions.

We note that the trial judge permitted cross-examination upon the same subject matter, but simply ruled out predicating the cross-examination questions upon the prior questions and answers. From the tender of proof in the record we do not believe that defendant was prejudiced by what we deem to have been too restrictive a ruling. Defense counsel was under no positive duty to affirmatively identify his role in the upcoming case before questioning a witness. He apparently made no misrepresentation, and was apparently seeking the truth. State's counsel was unduly critical of defense counsel in indicating before the jury that State's counsel should have been present at the interview, etc., but we hold this error to be harmless in the context of this case. 115

We have carefully examined all assignments of error. We affirm the convictions.

William S. Russell, Judge

CONCUR:

W. Wayne Olivér, Judge

Robert K. Dwyer, Judge

OCT 15 1974
JOHN A. PARKER, Clerk
BY

TO THE HONORABLE SUPREME COURT OF THE STATE OF TENNESSEE

AT KNOXVILE

OR TO ANY OF THE JUSTICES THEREOF

NOAH LUNDY Petitioner-In-Error	)	
VS.	)	NO. _____
STATE OF TENNESSEE Defendant-In-Error	)	

116

FOR PETITIONER-IN-ERROR:

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SUPREME COURT OF TENNESSEE, AT KNOXVILLE
SEPTEMBER TERM, 1974

DECREE

Filed March 10, 1975
John A. Parker, Clerk

NOAH LUNDY

(Nos. 7517 and 7518)

Vs.

STATE OF TENNESSEE

Knox Criminal

WRIT DENIED

This case coming on to be heard upon a transcript of the record from the Criminal Court of Knox County, opinion and Decree of the Court of Criminal Appeals, petition for certiorari, assignments of error and briefs of counsel, upon consideration whereof the Court is of opinion that the petition for writ of certiorari is not well taken, and said petition is denied.

The petitioner, Noah Lundy,

will pay the costs incident to filing petition for certiorari, for which let execution issue.

131

PER CURIAM